1981

Gardiner & Gardiner Builders et al v. Reid Swapp and Tanglewood SLC Associates : Brief of Crossclaimant-Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

GARDINER & GARDINER BUILDERS, ET AL., Plaintiffs, vs. REID SWAPP A/K/A REID SWAPP CONSTRUCTION, Crossclaimant-Appellant, and TANGLEWOOD SLC ASSOCIATES, Crossclaimant-Respondent, et al., Defendants.	Civil No. C80-4429 Appeal No. 18-079

BRIEF OF CROSSCLAIMANT-APPELLANT REID SWAPP

AN APPEAL FROM THE FINAL ORDER ISSUED BY THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE HAL TAYLOR, DISTRICT JUDGE, PRESIDING

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NATURE OF THE CASE

This appeal is brought by the crossclaimant-appellant, Reid Swapp, also known as Reid Swapp Construction Company, (hereinafter referred to as "SWAPP") from an Order of the Third Judicial District Court denying his Motion to Set Aside a Default Judgment entered against him on July 1, 1981, by Tanglewood SLC Associates, (hereinafter referred to as "TANGLEWOOD"), crossclaimant-respondent.

DISPOSITION IN THE LOWER COURT

The Third Judicial District Court, in and for Salt Lake County, The Honorable Hal Taylor, District Judge, presiding, denied Swapp's Motion to Set Aside the Default Judgment entered against him by Tanglewood on July 1, 1981. The Motion was predicated upon Affidavits on file with the Court and pursuant to Rule 60(b)(1) and (7) of the Utah Rules of Civil Procedure. The Motion was denied because:

(1) According to the Court, it was grounded upon a claim of "negligence" of Swapp's former attorney, which "negligence" the Court reasoned, was imputable to Swapp, and

(2) Because Swapp failed to bring his Motion within the three months of the entry of Judgment as provided by Rule 60(b). (See transcript of hearing, page 7, lines 18-21.)

RELIEF BEING SOUGHT

Crossclaimant-appellant Swapp appeals to the Supreme Court of the State of Utah for a reversal of the lower Court's Order denying Swapp's Motion to Set Aside the Default Judgment on grounds that the lower Court erred as follows:

(1) It erroneously characterized the flagrant misconduct of Swapp's previous attorney as "negligence";

(2) It erroneously imputed that impropriety to Swapp;

(3) It erroneously applied to the circumstances of this case Rule 60(b)(1) complete with its three month limitation;

(4) It failed to properly characterize Swapp's former attorney's conduct as withdrawal without notice or abandonment, which amounts to impropriety that cannot be imputed to Swapp and which is remediable under Rule 60(b)(7), for which the three month deadline is not applicable;

(5) In failing to exercise its legal discretion according to well-established precedent, the Court abused its discretion;

(6) That since the Order of the Court denying the setting aside of the Default was not made within the sound legal discretion of the Court, but by an abuse thereof, the Order denying Swapp's Motion should be reversed, the Default Judgment set aside, and the Execution predicated thereon declared a nullity.

FACTS OF THE CASE

On or about June 9, 1980, plaintiff Gardiner & Gardiner Builders, et al., filed a Complaint against, inter alia Reid Swapp a/k/a Reid Swapp Construction Company, and Tanglewood SLC, Ltd.

Shortly thereafter Swapp retained Steven D. Luster, a member of the Utah State Bar, whose offices are located in Salt Lake City, to represent Swapp in this lawsuit.

On or about July 21, 1980, Swapp, by and through his attorney of record, Steven D. Luster, filed both his Answer to plaintiff's Complaint and his Crossclaim against Tanglewood.

On or about December 16, 1980, Tanglewood filed its Answer to Swapp's Crossclaim.

On or about January 21, 1981, Tanglewood filed a Crossclaim against Swapp.

At this point the original plaintiff was substituted by a plaintiff in intervention, David L. Richie d/b/a Richie Construction Company, (hereinafter referred to as "RICHIE").

On February 19, 1981, Swapp filed his Answer to Tanglewood's Crossclaim.

At this point what the lower Court characterized as the "negligence" of Swapp's attorney commenced.

On or about April 2, 1981, Richie served Swapp's attorney with Interrogatories and Request for Production of Documents. Swapp's attorney never notified Swapp that these documents had been served or that Swapp was legally obligated to respond to them.

On or about May 8, 1981, Tanglewood served upon Swapp's attorney a set of Interrogatories and Request for Production of Documents; and again Swapp's attorney failed to inform Swapp that these documents had been served or of Swapp's obligation to respond thereto.

On or about June 10, 1981, Swapp's attorney, without Swapp's knowledge or consent, stipulated with Tanglewood to respond to Tanglewood's May 8, 1981, discovery papers by June 17, 1981. But Swapp's attorney did not inform Swapp of this committment, nor did he meet this deadline.

On or about June 10, 1981, Tanglewood served upon Swapp' attorney a Notice of Deposition requiring Swapp's attendance at the offices of Tanglewood's attorneys on June 30, 1981, at 9:30 a.m. Swapp's attorney failed to inform Swapp of the fact and details of this deposition; consequently, Swapp did not attend.

On or about June 19, 1981, Tanglewood made a Motion To Compel Swapp to respond to their discovery request. Once again, Swapp's attorney told Swapp nothing about these papers or their legal significance.

On June 30, 1981, Tanglewood moved the lower Court to strike Swapp's pleadings. Swapp's attorney did not inform Swapp of this Motion, nor did he respond to it.

On July 1, 1981, Tanglewood entered its Default against Swapp. Swapp's attorney did not inform him of this fact either.

Swapp first became aware of his dilemma on or about October 1, 1981, only after receiving Execution papers on his wife's real property. As soon as possible, Swapp enlisted the aid of his present attorneys, who moved to set aside the Default Judgment. That Motion was denied and Swapp makes this appeal.

The aforementioned facts are a matter of record with the Court and part of the Transcript on Appeal. The pertinent facts were also set forth in the Affidavit of Reid Swapp accompanying his Motion To Set Aside the Default Judgment, the denial of which forms the basis of this Appeal. It is to be noted that the facts set forth in that Affidavit were virtually uncontroverted by any answering Affidavits.

ARGUMENT

POINT I

AN ORDER DENYING A MOTION TO SET ASIDE A DEFAULT JUDGMENT IS APPEALABLE.

In the case of Blyth & Fargo Co. v. Swenson, 15 U. 345, 59 P. 1027 at 1028 (1897), the Utah Supreme Court held that: "An Order denying a Motion to set aside a judgment . . . must be regarded as a final judgment and appealable." Under this Rule, the Order of the Third Judicial District Court denying Swapp's Motion to Set Aside the Default Judgment is an appealable Order under Rule 73 of the Utah Rules of Civil Procedure which provides that "An appeal may be taken to the Supreme Court from all final orders and judgments . . ."

POINT II

DENIAL OF A MOTION TO SET ASIDE A DEFAULT JUDGMENT WILL BE REVERSED IF THE ORDER IS NOT MADE IN THE SOUND LEGAL DISCRETION OF THE TRIAL COURT.

In the case of Utah Commercial & Savings Bank v. Trumbo, 17 U. 198, 53 P. 1033 at 1036 (1898), the Utah Supreme Court held that: " . . . the setting aside of a judgment by default rests within the sound legal discretion of the Court, and the appellate Court will not interfere; but, where, as in this case, it is made clearly to appear that there was such an abuse of discretion, through inadvertence or otherwise, as to render the action erroneous and unlawful, the appellate Court will control such discretion, and set aside the illegal action. Such discretion does not confer upon the Court an arbitrary power beyond that of review. It is an impartial legal significance, which cannot be employed to the injury of any subject, but must be exercised fairly, reasonably, and in accordance with established principals of law."

Swapp here argues that the Order denying his Motion to set aside the Default Judgment was not made in the sound legal discretion of the Third Judicial District Court because, as shall hereafter be argued more fully, the weight of legal authority requires the setting aside of such a Judgment when it is shown that the Judgment was entered against the defendant because of his attorney's abandoning or withdrawing from his case without notice. Because the Court acted without sound

legal discretion, the trial court's Order is subject to review and reversal by the Supreme Court.

POINT III

SOUND LEGAL DISCRETION REQUIRES THE COURT TO RULE FAIRLY AND JUSTLY UNDER THE CIRCUMSTANCES.

While there is a need to achieve finality in litigation, judicial discretion must not achieve that end in disregard of what is right and equitable under the circumstances in a particular case. "Each case must . . . depend upon its own peculiar facts and circumstances." Heath v. Mower, 597 P.2d 855 at 858 (1979).

"The Trial Court must balance two valid considerations; on the one hand, to relieve the party of the Judgment vitiates the effect of res judicata and creates a hardship for the successful litigant by causing him to prosecute more than once his action and subjecting him to the possible loss of collecting his Judgment. On the other hand, the Court desires to protect the losing part who has not had the opportunity to present his claim or defense." Airkem Intermountain, Inc. v. Parker, 30 U.2d 65, at 67-68, 513 P.2d 429 at 431 (1973).

Under the circumstances of this case, the defendant Swapp has been burdened with a Default Judgment against him personally in excess of $80,000.00 simply because he was not aware that his attorney had abandoned him. No weight was given by the trial court to the fact that Tanglewood would not be

unduly prejudiced if the Judgment were set aside, or to the fact that Swapp had filed his Answer & Crossclaim against Tanglewood and was attempting to litigate his rights, or to the fact that immediately upon his realizing his dilemma, Swapp retained new counsel to assist him to reassert his rights. The Court denied Swapp's Motion without regard to the circumstances, thereby further blackening Swapp's already dismal opinion of the workings of the justice system.

The Supreme Court in Trumbo, supra, fairly pointed out that "a judge must have due regard to what is just and fair under existing circumstances and that he not act in an arbitrary, fanciful or unreasonable manner," Id at 1036. The Court further stated that "the power of the [trial] court to set aside judgments . . . should be liberally exercised, for the purpose of directing proceedings and trying causes upon their substantial merit; and where the circumstances which lead to the default are such as to cause the Court to hesitate, it is better to resolve a doubt in favor of the application so that a trial may be secured on the merits" Id.

POINT IV

THE COURT ABUSES ITS DISCRETION IF IT FAILS TO SET ASIDE A DEFAULT JUDGMENT IN CIRCUMSTANCES SIMILAR TO THOSE PRESENTED BY THE INSTANT CASE.

The trial court should set aside a default judgment whenever the defaulted party can show:

(1) A reasonable excuse for his non-appearance;

(2) That he used due diligence in attempting to defend;

(3) That he was prevented from appearing by circumstances over which he had no control;

(4) That the non-defaulting party will not be unduly prejudiced by the setting aside of the judgment; and

(5) That the defaulting party has a meritorious defense.

In Heath v. Mower, supra, this Court held that a defendant who failed to provide a "reasonable excuse for his non-appearance" should not be relieved from his judgment. The implication being that the presentation of a reasonable excuse would entitle him to relief. Furthermore, In Airkem Intermountain, Inc., v. Parker, supra, this Court required that a party, to obtain relief from a Judgment, "must show that he has used due diligence and that he was prevented from appearing by circumstances over which he had no control."

In cases decided in neighboring jurisdictions, the further showing that the non-defaulting party would not be unduly prejudiced and that the defaulting party have a meritorious defense have both been required. See Buckert v. Briggs, 15 Cal. App. 3d 296, 93 Cal. Rptr. 61 (1971), and St. Vrain Development Co., v. F. & S. Development Co., 470 P.2d 49 (Colo., 1970).

In the present case Swapp had a reasonable excuse for his non-appearance to Tanglewood's discovery request; and had used due diligence in retaining an attorney, but was prejudiced by his attorney's failure--complete failure--to communicate with him. Swapp's non-responsiveness was due to circumstances over which he had no control, for he continued to contact his attorney, but received no word from counsel with regard to the progress of his case or his obligations to answer pleadings filed therein. Swapp did his best to defend, but was hindered by the inexcusable inpropriety and misconduct of his attorney. That he had a meritorious defense is clear from the record, and that Tanglewood would not have been prejudiced by the setting aside of the default judgment is also clear.

Under these circumstances, the Default should have been set aside. According to this Court's holding in Board of Education of the Granite School District v. Cox, 14 U.2d 385, 384 P.2d 806 at 807 (1963), "it is an abuse of discretion to refuse to vacate a default judgment where there is reasonable justification for the defendant's failure to appear and answer."

In another case, this Court observed that "to clamp a judgment rigidly and irrevocably on a party without a hearing is obviously a harsh and oppressive thing . . . For that reason it is quite uniformly regarded as an abuse of discretion to refuse to vacate a default judgment where there

is reasonable justification or excuse for the defendant's failure to appear and timely application is made to set aside." Mayhew v. Standard Gilsonite Co., 14 U.2d 52, 356 P.2d 951 at 952 (1962).

In a case where an attorney abandons his client or withdraws without notice and the client is consequently burdened with a judgment against him, this Court has held that it is an abuse of discretion not to set aside the judgment.

The controlling case is Interstate Excavating v. Agla Development, 611 P.2d 369 (Utah 1980). In that case a defendant did not receive notice of the trial date from his attorney after the attorney's withdrawal from the case. Upon receipt of notice of the default judgment, the defendant, like Swapp, contacted new counsel who diligently sought to attack the default judgment. The Court stated that "where there is doubt about whether a default should be set aside, the doubt should be resolved in favor of doing so."

Similar Utah Supreme Court holdings have been handed down in cases where default judgments have been entered due to the impropriety or misconduct of the defaulting party's attorney: See Blyth v. Fargo Co., v. Swenson, supra; Utah Commercial & Savings Bank v. Trumbo, supra; Airkem Intermountain, Inc., v. Parker, supra.

In agreement with these Utah's decisions are the holdings of the highest appellate courts of a number of neighboring jurisdictions:

In the Arizona case of Treadway v. Meador, 103 Ariz. 83, 436 P.2d 902 (1968), the Arizona Supreme Court held that the trial court abused its discretion in failing to set aside a judgment of dismissal entered for failure of parties to answer Interrogatories. Like Swapp, these parties had engaged an attorney and attempted to comply with the Court's directions, but the retained attorney failed to file answers as requested. See also Hansen v. Willis, 8 Ariz. App. 175, 444 P.2d 732 (Ariz. 1968).

In the California case of Buckert v. Briggs, supra, the California Court of Appeal for the Fourth District held that where plaintiffs' attorney had no basis for his belief that plaintiffs had lost interest in their case and plaintiffs had assumed and had no reason not to believe that their attorney would represent them, their attorney's failure to advise the plaintiffs of their trial, apparently pursuant to a preconceived intention not to act in their behalf, constituted positive misconduct within the exception to the general rule that accident or mistake authorizing relief from a default judgment may not be predicated upon neglect of a party's attorney, whose negligence is imputed to his client. Therefore, the judgment was properly set aside. These plaintiffs, like corssclaimant-appellant Swapp, had reposed their trust in an attorney who had through positive misconduct abandoned his clients. The California Court did not deem such misconduct

as "neglect" which could be imputed to these plaintiffs. By the same token the misconduct of Swapp's attorney should not be imputed to Swapp. Abandonment without notice is according to the California Court of Appeals, positive misconduct that falls within the "exception to the general rule that the negligence of an attorney may be imputed to his client.

In the Colorado case of Coerber v. Rath, 435 P.2d 228 (Colo., 1968), the Court held that where the primary cause of the defendant's failure to answer Interrogatories was the inexcusable neglect of their counsel in whom they had placed their confidence and where the setting aside of the default judgment would not have unwarrantedly prejudiced the plaintiff, the trial court abused its discretion in refusing to set aside the default.

In another Colorado case, St. Vrain Development Co., v. F. & S. Development Co., supra, the Court held that where a party has not been guilty of negligence, a judgment against him may be set aside if it was obtained because of the negligence of his attorney, provided he has a good cause on the merits, substantial justice will be done and can be done without undue prejudice to the other party.

In the Oklahoma case of Rogers v. Sheppard, 192 P.2d 643 (Okl. 1948), the Court there held that the abandonment of a client's cause by his attorney, without the knowledge of the client, constituted "unavoidable casualty or misfortune," under a statute authorizing the Court to vacate a default

judgment and that a denial of the client's motion to set aside was a clear abuse of discretion. See also, Grayson v. Smith, 165 P.2d 984 (Okl. 1946); and Hart v. Pharaoh, 359 P.2d 1074 (Okl. 1961).

In the Hawaii case of Stafford v. Dickson, 374 P.2d 665 (Ha., 1962), the Court held that where a defense attorney was permitted to withdraw on the day of the Pre-Trial Hearing and where the Court knew that the defendant had left the State and was not notified of the hearing or of the withdrawal of his attorney and a default judgment was entered against the defendant for his failure to appear for the Pre-Trial, the defendant was deprived of due process of law and the default judgment was declared void.

Pursuasive authority from other jurisdictions supports the Utah Supreme Court's holding in Interstate Excavating v. Agla Development, supra: where a party is defaulted and judgment is entered against him due to the misconduct of his attorney, the client is not to be faulted under the theory that the negligence of his attorney is imputable to the client; and that upon a showing that the client was without knowledge of his attorney's abandon and withdrawal a default judgment entered in such circumstances should be set aside in the interest of judgment.

POINT V

THE COURT ABUSED ITS DISCRETION WHEN IT DENIED THE MOTION TO SET ASIDE THE DEFAULT JUDGMENT ON GROUNDS THAT IT WAS NOT BROUGHT WITHIN THE THREE MONTH TIME LIMIT.

Rule 60(b) of the Utah Rules of Civil Procedure provides that:

> Upon motion and upon such terms as are just, the Court may, in the furtherance of justice, relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) Mistake, inadvertence, surprise, or excusable neglect; . . . or (7) Any other reason justifying relief from the operation of the judgment.
>
> The Motion shall be made within a reasonable time, and for reasons (1),(2),(3), or (4), not more than three months after the Judgment, Order, or proceeding was entered or taken.

Swapp made his Motion to Set Aside the Default Judgment on October 9, 1981, just three months and nine days after the Judgment was entered against him on July 1, 1981. Swapp missed the deadline for his Motion by nine days, and this happened because he did not learn of the Judgment against him until on or about September 20, 1981, as a result of Tanglewood's Execution against his wife's property. Swapp was not able to retain new counsel until on or about October 1, 1981, and his new counsel were not able to obtain the copies of the pleadings in the case until sometime thereafter. The Motion to set aside was filed on October 9, 1981, along with new counsel's Notice of Appearance.

Because Swapp missed the three month deadline by nine days, Swapp (who had attempted diligently to defend himself in this lawsuit) had entered against him a Default Judgment of over $80,000.00 and an Execution Sale has taken place in which Tanglewood has purchased both his home and his wife's property, valued at approximately $150,000.00, for the sum of $45,000.00.

The trial court allowed this Default Judgment to stand in spite of these circumstances, on grounds that defendant's Motion was barred by the three month time limit.

Defendant Swapp argues that his Motion should have been granted under Rule 60(b)(7), on grounds that a Motion made under sub-paragraph (7) is not subject to the three month Fule, but may be made within a "reasonable time." Though defendant raised both the Rule 60(b)(1) ground of "mistake, inadvertence, surprise, or excusable neglect" as well as the Rule 60(b)(7) ground, it is clear from the record and the affidavits, that Swapp's former attorney was neither mistaken, inadvertent, surprised, or excusably negligent in his handling of Swapp's case. Steven D. Luster was involved in gross negligence, inexcusable neglect, impropriety, and misconduct that caused Swapp, in the words of the Oklahoma Supreme Court, "unavoidable casualty and misfortune" which was beyond the control of Swapp and which cannot justly be attributed to him as layman who reposed his confidence and trust in an attorney whom he assumed was representing him, but who had abandoned him without notice.

Clearly these facts require the application of Rule 60(b)(7), for they are reasons "justifying the relief from the operation of the Judgment" which are not governed by the three month Rule. Swapp had no way of knowing, except from his attorney, about the developments taking place in his case. As soon as Swapp discovered the problem, he acted and his present attorneys acted with dispatch. If there is a circumstance in which relief from a Judgment is warranted and where a Motion for Setting Aside a Judgment should be exempted from the three month deadline under sub-paragraph (7) of Rule 60(b), then surely this is it. Just such a case as this must have been contemplated by those drafting the Rule's "reasonable time" language.

CONCLUSION

Under the circumstances of this case, where Swapp was virtually abandoned by his attorney without notice and suffered therefor the entry of the Default Judgment against him on July 1 1981, in a sum exceeding $80,000.00, a Motion to Set Aside the Default Judgment, brought three months and nine days later, should not have been denied by the Third Judicial District Court because that Motion was brought too late or because it was grounded upon "negligence" that is imputable to the client, but should have been granted on grounds that the Motion was predicated on circumstances evidencing, not "mistake, inadver-

tence, surprise, or excusable neglect," but rather "other reasons justifying relief from the operation of a Judgment" involving attorney misconduct and impropriety, which grounds will sustain a motion even after the Rule's three-month deadline, so long as it is brought within a "reasonable" time period. The Lower Court's failure to grant Swapp's Motion constitutes an abuse of discretion remediable on appeal. For these reasons, the Supreme Court of Utah should reverse the Order of the Third Judicial District Court, and grant the setting aside of the Default, declare void the Default Judgment, and further void any post-judgment proc-edings predicated thereon. See generally Jenkins v. Arnold, 573 P.2d 1013 (Kan. 1978).

RESPECTFULLY SUBMITTED December 3, 1981.

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by depositing the same in the U.S. Main, postage prepaid, this

3 day of ~~November~~ December, 1981.